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Published in:
Environmental Law Review

DOI:
[10.1350/enlr.2014.16.1.201](https://doi.org/10.1350/enlr.2014.16.1.201)

Publication date:
2014

Citation for published version (APA):

Emeseh, E., Aboah, A., & Barmakhshad, H. (2014). Framework for Achieving Sustainability in Investment Decisions: Reflections on Rio+20. *Environmental Law Review*, 16(1), 21-41.
<https://doi.org/10.1350/enlr.2014.16.1.201>

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Framework for Achieving Sustainability in Investment Decisions: Reflections on Rio+20

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Keywords: international investment law, sustainable development, environmental protection, investment arbitration, Rio+20, international economic law

Abstract: The quest for environmental protection alongside economic development has been one of the prominent themes of political and legal discourse for several decades. This article examines the extent to which the principle of sustainable development (introduced under the Rio Declaration 1992) as a conceptual framework for balancing these competing goals has been integrated within the international investment law regime. It does this by examining decisions of investment tribunals on disputes relating to the legitimacy of government measures on environmental grounds. The analysis evidenced a lack of clear principles and mechanisms for balanced consideration of all competing interests; with the outcome being generally the subordination of environmental concerns to the protection of investors' economic interests under international investment law. This supports criticism that although sustainable development has become one of society's most sought-after goals, progress towards achieving this has been frustratingly slow. Against this background, the article goes on to determine whether the outcomes from the hugely anticipated Rio+20 Conference provided a framework or mechanisms that could promote sustainability integration in investment arbitrations. The article finds that while the outcome document from the main Rio+20 Conference did not provide such a framework, the Declaration from the Judge's Conference, which was organised by UNEP and held simultaneously in Rio, provided some principles and mechanisms that, if fleshed out, could contribute towards better integration of sustainability in the investment regime.

1 INTRODUCTION

Reconciling the apparent conflicts between environmental and economic concerns in the quest for development has been a key challenge since the problem first came to prominence at the United Nations Conference on the Human Environment 1972.¹ The principle of sustainable development was proposed by the World Commission on Environment and Development in 1987² as a conceptual framework for addressing the challenge. This was

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1 The convening of this conference was driven largely by the environmental movement, which was galvanised by a book entitled *Silent Spring* by marine biologist, Rachel Carson. Published in 1962, the book sought to expose the hazards of pesticide use on flora, fauna and humans and eloquently questioned humanity's faith in technological progress. See R. Carson, *Silent Spring* (Houghton Mifflin: Boston, 1962).

2 WCED, *Our Common Future* (Oxford University Press: Oxford, 1987). Available at: www.un-documents.net/ocf-02.htm (last accessed 30 August 2012). This report, popularly known as the Brundtland Report, defines sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs' (p. 43).

adopted at the first Rio Conference in 1992.³ The resulting Rio Declaration required governments, at both national and international levels, to put in place legal mechanisms required to achieve the goal of sustainable development.⁴

In light of its origin, environmental protection and the rational use of natural resources is a central component of the sustainable development principle which comprises three main pillars (environment, social and economic).⁵ Principle 4 of the 1992 Rio Declaration clearly recognises this when it provides that ‘in order to achieve *sustainable development*, *environmental protection shall constitute an integral part of the development process* and cannot be considered in isolation from it’.⁶ Thus, what is envisaged is a mechanism that integrates all three components within the development paradigm. The current global economic order is predicated on the pursuit of economic growth, which is largely dependent on international trade and investment. Transforming the governance of these regimes,⁷ in particular by more effectively integrating environmental, social and economic concerns, is therefore crucial to the achievement of sustainable development.⁸ In furtherance of this, Agenda 21 specifically recognises the need for states to ‘strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements or instruments’.⁹ This was a notable paradigm shift from the traditional ‘environment-only’ approach of laws and policies, to a new system referred to as the ‘law of sustainable development’ wherein environmental, social and economic considerations co-exist equally and simultaneously.¹⁰

However, implementing this new integrated approach, particularly in terms of how best to address tensions between its three recognised pillars, remains problematic, perhaps because the meaning and ambit of the principle of sustainable development are essentially

3 Principles 3 and 4 of the Rio Declaration on Environment and Development, 1992, 31 ILM 874. This was adopted at the first Rio Conference – the United Nations Conference on Environment and Development 1992.

4 See Rio Declaration, *ibid.*, Principle 11, Chapters 8, 38, 39; Agenda 21 of the Rio Declaration. Available at: www.unep.org/Documents/Multilingual/Default.asp?documentid=52 (last accessed 20 October 2012).

5 E. Cavagnaro and G. Curiel, *The Three Levels of Sustainability* (Greenleaf Publishing Ltd: Sheffield, 2012) 29.

6 This sentiment has been reiterated in paragraph 4 of the 2012 Rio+20 outcome document, *The Future We Want*, which provides, *inter alia*, that ‘... promoting sustainable patterns of consumption and production and protecting and managing the natural resource base of economic and social development are the overarching objectives of, and essential requirements for sustainable development’. Available at: <http://sustainabledevelopment.un.org/futurewewant.html> (last accessed 30 August 2012).

7 Although it has been questioned whether sustainable development, with environmental and social concerns as its core premise, can even be achieved within the current global economic system. See G. Carvalho, ‘Sustainable Development: Is it Achievable within the Existing International Political Economy Context?’ (2001) 9 *Sustainable Development* 61–73; H.E. Daly, *Beyond Growth: The Economics of Sustainable Development* (Beacon Press: Boston, 1997).

8 As popularised by the Brundtland Commission’s definition, which denotes sustainable development as a ‘path that meets people’s needs in a way that the social, economic and environmental stock on which that development depends is not depleted in the process’. See H. Bugge and L. Watters, ‘A Perspective on Sustainable Development after Johannesburg on the Fifteenth Anniversary of “Our Common Future”’: An Interview with Gro Harlem Brundtland’ (2003) 15 *Georgetown International Environmental Law Review* 359 at 363. Also see A. Kolo, ‘Dispute Settlement and Sustainable Development of Natural Resources in Africa’ in F. Botchway (ed.), *Natural Resource Investment and Africa’s Development* (Edward Elgar: Cheltenham, 2011) 49–71.

9 See Agenda 21, above n. 4, Chapter 39(1)(b).

10 The shift was made in Working Group III, at the fourth session of the UNCED Preparatory Committee (New York, March 1992), following a proposal by the Brazilian delegate. See P. Sands, ‘UNCED and the Development of International Environmental Law’ (1993) 8(2) *Journal of Natural Resource and Environment Law* 209–228.

contested.¹¹ Consequently, while there has been a considerable increase in the number of laws and policies on specific environmental concerns (and institutions to drive these) at both national and international level,¹² the integration of sustainable development into legal frameworks primarily focused on economic growth, such as international trade and investment, has been slow, patchy and tentative. While environmental and social issues have been introduced into legal instruments in these regimes, the provisions are drafted in a broadly hortatory and aspirational manner rather than the mandatory protections granted to economic interests. This prioritises economic considerations, with environmental and social concerns assuming an ancillary role.¹³ Within this context, the decisions of arbitral tribunals play a crucial role in the development of the jurisprudence on sustainable development and the practical integration of its three pillars in these regimes. Regrettably, however, there are no guidelines or implementation mechanisms that ensure adequate and consistent recognition of the environmental and social components of sustainable development by these tribunals. This is still the case even after another UN conference (the World Summit on Sustainable Development) held in Johannesburg in 2002, ten years after the first Rio Conference, focused specifically on the challenge of implementing the principles of sustainable development.¹⁴

What, then, are the implications of this gap for achieving sustainable development and to what extent, if any, has the recent Rio+20 Conference¹⁵ addressed these concerns? This article critically explores these questions through an analysis of one of the main international economic law regimes – international investment law – and, in particular, the jurisprudence arising from arbitral decisions related to disputes over environmental matters. The focus on environment only, rather than both the social and environment components, is to enable in-depth analysis of the cases. International investment law, along with its associated arbitral decisions, provides a germane and instructive case study within the context of the focus of this article. Foreign investment undeniably drives the process for economic development in the current world economic order, plays a significant role in most countries' economies, and has been the largest source of external finance for

11 See S. Connelly, 'Mapping Sustainable Development as a Contested Concept' (2007) 12(3) *Local Environment* 259–278; D. Springett, 'Business Conceptions of Sustainable Development: A Perspective from Critical Theory' (2003) 12(2) *Business Strategy and the Environment* 71–86; A.H.T. Fergus, J.I.A. Rowney, 'Sustainable Development: Lost Meaning and Opportunity?' (2005) 60(1) *Journal of Business Ethics* 17–27; T. N. Gladwin, J. J. Kennelly and T.S. Krause, 'Shifting Paradigms for Sustainable Development: Implications for Management Theory and Research' (1995) 20(4) *Academy of Management Review* 874–907.

12 See R. E. Dunlap and R. Scarce (1991) 'Poll Trends: Environmental Problems and Protection' 55(4) *The Public Opinion Quarterly* 651–672; P. Sands, *Principles of International Environmental Law: Frameworks, Standards and Implementation* (Manchester University Press: Manchester, 1995) 34–37.

13 E. Emeseh, 'Globalisation and Resource Development in Africa: Assessing the Facilitator–Protector Roles of International Law and International Institutions' (2008) 25(5) *Development Southern Africa* 561–576; T. Waelde and A. Kolo, 'Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law' (2001) 50(4) *International and Comparative Law Quarterly* 811–848; G. Verhoosel, 'Foreign Direct Investment and Legal Constraints on Domestic Environmental Policies: Striking a "Reasonable" Balance Between Stability and Change' (1998) 29 *Law and Policy in International Business* 451–479. The same argument has been made at national level. See, for instance, A. Ross-Robertson, 'Is the Environment Getting Squeezed Out of Sustainable Development?' (2003) 2 *Public Law* 249–259.

14 The main outcomes of this conference, dubbed 'Rio+10', are the Johannesburg Declaration on Sustainable Development and the Johannesburg Plan of Implementation. Available at: www.un.org/js/summit/ (last accessed 20 September 2012). For a general discussion of the conference and its outcomes, see L. Hens and B. Nath (eds), *The World Summit on Sustainable Development* (Springer Netherlands: Houten, 2005). See also H. M. Osofsky, 'Defining Sustainable Development after Earth Summit 2002' (2003) 26 *Loyola of Los Angeles International and Comparative Law Review* 111.

15 This conference was held in Rio de Janeiro, Brazil, 20–22 June 2012.

developing countries over the last two decades.¹⁶ The main recipient of such investment in developing countries has often been the natural resources sector, which is known to carry significant environmental and social risks. As the next section will demonstrate, there are a plethora of Bilateral Investment Treaties (BITs),¹⁷ as well as some regional treaties,¹⁸ but there is, as yet, no international instrument on investment which provides a binding framework for integrating sustainable development into international investment law.¹⁹ Consequently, outcomes from arbitral decisions provide a lens through which the integration of environmental concerns into the regime may be ascertained. Furthermore, the international governance of foreign investments tends to circumscribe, at least in some respects, sovereign-state action within their domestic jurisdiction. Meanwhile, the lack of firm obligations under international law and the fierce competition for foreign investment, especially among developing countries, has substantially strengthened the position of the foreign investor in relation to host states.²⁰ Although developing countries are far more susceptible to the power of multinational corporations (MNCs), the 2008 global financial crisis revealed that even the major developed economies had failed to regulate MNCs effectively, especially those in the financial sector.²¹

This article comprises five parts. Following this introduction, section two provides a brief overview of international investment law, followed by a more in-depth analysis of investment arbitral tribunals' decisions on environment-related matters in section three. Section four evaluates the implications of this analysis for the goal of achieving sustainable development. Section five then provides an assessment of the outcomes from the two conferences in Rio²² in the light of the stated aims of this article (that is, to identify possible 'mechanisms' by which courts and tribunals may adopt a broader and more consistent interpretative approach to environmental concerns in investment decisions in line with the goal of achieving sustainable development). Section six concludes.

2 INTERNATIONAL INVESTMENT LAW

Foreign investment has burgeoned, particularly over the last three decades, partly as a result of the great number of investment agreements designed to protect foreign investors

16 NCTAD, *External Finance, Debt and Foreign Direct Investment*. Report by the Secretary-General of the United Nations to the General Assembly at its fifty-eighth session, Chapter 2. Available at: http://unctad.org/en/Docs/gdscsir20041c2_en.pdf (last accessed 3 September 2012). See also UNCTAD, *World Investment Report 2006 – FDI from Developing and Transition Economies: Implications for Development 2006* (UNCTAD: New York & Geneva 2007); UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (UNCTAD: New York and Geneva 2013).

17 Bilateral investment agreements refer to an agreement between two states only.

18 There are a few regional investment agreements. See, e.g., the North American Free Trade Agreement (NAFTA) (which entered into force on 1 January 1994) between the governments of Canada, Mexico and the United States (US), creating a trilateral trade and investment bloc in North America. Other examples include the Energy Charter Treaty (ECT) signed in December 1994; and the Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA), which came into effect in April 1998. To date, this Treaty has been signed or acceded to by 51 states, the European Community and Euratom (bringing the total number of signatories to 53).

19 S.P. Subedi, *International Investment Law: Reconciling Policy and Principle*, 2nd edn (Hart Publishing: Oxford, 2012).

20 See Subedi, *ibid.* at 41.

21 E. Emeseh, R. Ako, P. Okonmah, and L.O. Obokoh, 'Corporations, CSR and Self Regulation: What Lessons from the Global Financial Crisis?' (2010) 11 *German Law Journal* 230–259.

22 See *The Future We Want*, above n. 6, and the Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability. Available at: www.unep.org/rio20/Portals/24180/Rio20_Declaration_on_Justice_Gov_n_Law_4_Env_Sustainability.pdf (last accessed 1 September 2012).

from losing their assets by according to them certain substantive rights.²³ These include expropriation – protection against the taking, or measures tantamount to the taking of property,²⁴ fair and equitable treatment (FET),²⁵ most-favoured nation treatment (MFN),²⁶ and national treatment (NT)²⁷ among others.²⁸ However, there are no corresponding substantive obligations for foreign investors.²⁹ In this context, one question which has increasingly been the subject of debate among academics is whether there is a need for a greater balance between the legitimate rights and interests of all parties involved – host states and investors – in investment agreements.³⁰

While the historical context of investment law is important, it is too simplistic to suggest that the regime should not be concerned with cardinal environmental, human rights, anti-corruption, or other obligations. In line with the principle of sustainable development, an holistic approach to development would be for international investment agreements to impose direct environmental or other related obligations³¹ upon foreign investors. Unfortunately, all efforts at developing such a regime have failed, particularly because developed states did not heed the many calls from the newly emergent states to enter into a binding framework.³² The alternative to a multilateral investment treaty which entrenches sustainability in the international investment regime is a modification of all BITs; a very arduous task bearing in mind that over 3,000 investment agreements are currently in force worldwide.³³ Even current investment agreements that contain environmental protection tend to do so in relatively vague terms; they cannot derogate

23 P. Sands, J. Peel, A. Fabra and R. Mackenzie, *Principles of International Environmental Law*, 3rd edn (Cambridge University Press: Cambridge, 2012).

24 Expropriation implies the taking of property either directly or indirectly and has been one of the most protected substantive principles of investment law. See A.P. Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20(1) *ICSID Review* 1–57.

25 See NAFTA, above n. 18 at Art. 1105, which requires that 'each contracting party shall, in accordance with the provisions of this treaty, encourage and create stable, equitable, favourable and transparent conditions for investors of other contracting parties to make investments in its area. Such conditions shall include a commitment to accord at all times to investments of investors of other contracting parties' fair and equitable treatment'.

26 This provision seeks to ensure that the host state (HS) accords treatment no less favourable than that which it accords to its own investors, particularly when they are in like circumstances or similar investments. See United Kingdom (UK) Model BIT (2005) Art. 3(1).

27 This provision seeks to ensure that the HS accords the same favourable treatment to all foreign investors from different countries. See Spain–Argentina BIT (1991) Article IV(2); *Plama Consortium Limited v Republic of Bulgaria*, Decision on Jurisdiction, 8 February 2005, 44 ILM (2005) 721, paras 191, 195.

28 Usually contractual agreements such as concession agreements. An example is the Argentina–US BIT (signed 14 November 1991; entered into force 20 October 1994), Article XI: 'This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.'

29 See Emeseh, above n. 13.

30 L. Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration* (International Centre for Human Rights and Democratic Development, 2009) Available at: www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf (last accessed 12 October 2012).

31 For instance: environment law, public health, human rights law and corruption, among others.

32 Such failed attempts include the Multilateral Agreement on Investments: above n. 19 at 52.

33 M. Malik, 'Recent Developments in International Investment Agreements: Negotiations and Disputes', Background Papers to the Annual Forum for Developing Country Investment Negotiators, (27–29 October 2010) IV/2, Available at: www.iisd.org/pdf/2011/dci_2010_recent_developments_iias.pdf (last accessed 20 October 2012).

from the substantive protections granted to investors even where serious environmental concerns may be at stake.³⁴

Foreign investment protection mechanisms continue to grow rapidly. These include dispute settlement mechanisms³⁵ which do not require the exhaustion of local remedies³⁶ but allow foreign investors to seek arbitration under the substantive reliefs mentioned above where there is loss or interference with their foreign investments. Equally significant is that these investor-state arbitrations under international investment law have brought to bear the various overlaps and interactions between international investment law and international rules derived from other domains of international law.³⁷

As noted earlier, current international investment law does not offer a systematic set of rules that can be applied to decide disputes which are predicated on environmental concerns resulting in international investment tribunals justifying their reasoning in diverse ways and arriving at differing conclusions or outcomes.³⁸ This is set against the background of the increasing use by foreign investors of protectionist mechanisms, such as investment arbitration, to challenge host state regulatory actions in the environmental and social sphere as a breach of foreign investment protection rules.³⁹ Investment disputes under the North American Free Trade Agreement (NAFTA) include host state regulations on environmental protection, public safety, human health and the regulation of water and sewage concessions which were deemed to impact on foreign investment property.⁴⁰

34 A critical look at the US Model BIT affirms this position. It states that when in doubt, these treaties should be interpreted *in favorem* investors, stressing and expanding their rights so as to promote the flow of foreign investment: see R. Dolzer, 'Indirect Expropriations: New Developments?' (2002) 11 *New York University Environmental Law Journal* 73.

35 Washington Convention on the Settlement of Disputes between States and Nationals of other States (entered into force 18 March 1965) 575 UNTS 159 (ICSID). This is referred to as the International Centre for the Settlement of Investment Disputes (ICSID). The ICSID Convention is a purpose-built facility of the World Bank Group dedicated to the resolution of investment disputes. Available at: <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> (last accessed 29 January 2010).

36 Some treaties may require exhausting the local remedies or a waiting period before submission to arbitration will be allowed: the UK–Jamaica BIT permits submission of disputes to ICSID arbitration only if an 'agreement cannot be reached through pursuit of local remedies in accordance with international law'. However, in contrast to the process under major IHRs instruments, most treaties do not condition access to international arbitration upon the exhaustion of domestic legal remedies: see M. Sornarajah, *The International Law on Foreign Investment*, 3rd edn (Cambridge: Cambridge University Press, 2010) 220–221; *Adriano Gardella v Ivory Coast*, 1 ICSID Reports 287; *Mobil Oil v New Zealand* 4 ICSID Reports 147, 158.

37 See Emeseh *et al.*, above n. 21.

38 For instance, by the use of proportionality in certain disputes. See J. Krommendijk and J. Morijn, 'Proportional by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration in Human Rights' in P. Dupuy, F. Francioni and E. Petersmann (eds), *International Investment Law and Arbitration* (Oxford University Press: Oxford, 2009).

39 *Piero Foresti, Laura De Carli and Others v The Republic of South Africa*, ICSID Case No. ARB(AF)/07/1 – an investment treaty arbitration filed by Italian investors against the South African Government in relation to its policy to promote greater racial diversity in management and ownership positions in the South African economy.

40 *Glamis Gold Ltd v United States of America*, UNCITRAL Award, 6 June 2009 at para. 8; *Mondev International Ltd v United States of America*, ICSID Case No. ARB (AF)/99/2, Award, 11 October 2002, para. 144; *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras 377–397; *Azurix Corporation v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (*amicus curiae*) Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, para. 10; the tribunal concluded under Art. 15(1) of the UNCITRAL Arbitration rules and deemed that the tribunal had power to accept *amicus curiae* briefs; *Mondev International Ltd v United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, para. 144; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award 24 July 2008, para. 602.

Based on matters of arbitral jurisdiction and other key factors⁴¹ in an investment dispute, the concept of indirect expropriation or FET may override an environmental claim, thereby posing serious concerns for attaining the goal of sustainable development. If governments are unduly held liable for the impact of regulations made for valid public-policy purposes, they will restrict the exercise of their sovereign regulatory obligations for the benefit of their citizens owing to potential claims for breach of investment protection rules – the ‘regulatory chill’.⁴²

3 INVESTMENT–ENVIRONMENT DECISIONS

This section explores some investment–environment decisions to ascertain whether there is a logical framework by which tribunals assess the legitimacy of governmental measures to protect the environment. Environmental concerns are the basis for host state’s action in all the cases selected for this analysis. For reasons of consistency and because they have given rise to more cases centred on environmental concerns, the analysis focuses mostly on disputes under NAFTA. Even though NAFTA is a tripartite treaty and therefore binds only Mexico, Canada and the United States of America, its arbitrations break ground into uncharted investment dispute terrains – including environmental concerns – and thus offer a reference point for other investment tribunals (albeit with the recognition that there is no binding rule of precedence in investment arbitration).⁴³ Of about ten cases on environment–investment disputes, the discussion that follows focuses on seven which encapsulate the main approach adopted by investment tribunals. Following an overview of the cases and analysis of the decisions, the article will attempt to identify common themes, with the intention of drawing out some conclusions.

- 41 A key problem in the investment treaty field is that the balance of power between treaty parties and tribunals concerning the authority to interpret investment treaties is uneven. In theory, treaty parties are supreme when creating the law and tribunals are supreme when applying it in particular cases. In practice, this separation is never complete. How treaty parties interpret and apply the law affects what tribunals decide in particular cases. In addition, tribunal awards, in particular cases, informally contribute to the interpretation, and thus the creation, of the law. As a result, some interpretive balance exists between treaty parties and tribunals, though neither enjoys ultimate interpretive authority in all circumstances. See A. Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 *American Journal of International Law* 179; see ICSID, above n. 35, at Art. 25(1), which sets out this limited jurisdiction as ‘The Jurisdiction of the Centre shall extend to any Dispute arising directly out of an Investment, between a Contracting Party (HS) ... a national of another Contracting party (Home state)’.
- 42 This argument pertains to the view that arbitrations are costly both in financial and reputational terms to a nation and can negatively affect its potential to attract investors. The fear of this impact may induce a country not to adequately legislate or take measures to encourage the protection of vital environmental, human rights or other social concerns. See K. Tienhaara, ‘Regulatory Chill and the Threat of Arbitration: A View from Political Science’ in C. Brown and K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press: Cambridge, 2011) 606.
- 43 Notwithstanding the non-existence of precedent in the investment arbitration context, there have been several instances in which arbitral panels have looked at the decisions, tests and conclusions made by other arbitral panels in formulating their interpretation process. For example, in *Saipem SpA v People’s Republic of Bangladesh* (2007) the tribunal ruled that it ‘considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby meet the legitimate expectations of the community of States and investors towards certainty of the rule of law’: ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendations on Provisional Measures Award on 21 March 2007 para. 67. Thus decisions such as *Metalclad v Mexico*, though based on the NAFTA, could possibly influence another tribunal’s ruling.

3.1 NON-AFFIRMATION OF ENVIRONMENTAL PURPOSE UNDERLYING GOVERNMENT MEASURE

In *Santa Elena v Costa Rica*,⁴⁴ the investor, Santa Elena Corporation, acquired property. It undertook various financial and technical analyses after which it designed a land-development project comprising a tourist resort and a residential community. However, because of the negative impact on a wide variety of tropical wildlife and in light of its international environmental obligations, the Costa Rican Government issued an expropriation decree for the property. The investors did not object to the expropriation, but contested the amount of compensation offered by the government and filed for arbitration under the ICSID process.⁴⁵

The tribunal focused only on the obligation to pay compensation and did not consider the environmental merits, considering the international source of the obligation to protect the environment to be irrelevant.⁴⁶ It refused to examine the evidence submitted by the Costa Rican Government concerning its international obligations to preserve the confiscated property,⁴⁷ stating that:

expropriatory environmental measures no matter how laudable and beneficial to society as a whole are ... similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.⁴⁸

From this ruling, the *Santa Elena* award clearly establishes that the purpose of the governmental measure – protecting the environment and competing international obligations in this case – does not alter the legal character of the taking for which adequate compensation must be paid.

Metalclad v Mexico, is rather more convoluted.⁴⁹ The investor was operating a waste landfill in the city of Guadalcázar, Mexico, based on a previously received authorisation and a landfill-operating permit from the federal authority, without obtaining the required municipal construction permit.⁵⁰ During the landfill inauguration day, demonstrators blocked the entrance⁵¹ and the municipality rejected the construction permits for, among other things, community opposition and the adverse environmental impact of the landfill operation.⁵² Further attempts were then made to reconcile the interests of both parties.

44 *Compania del Desarrollo de Santa Elena SA v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000.

45 *Ibid.* at paras 15–21.

46 *Ibid.* at paras 71, 171.

47 The text of the *Santa Elena* award, the sweeping language of the above statements regarding the non-relevance of states' international obligations, as well as other decisions of investment tribunals indicate that the scope of these statements is confined to expropriations. This is particularly true with regard to the measure of compensation, for which tribunals generally have a much larger measure of discretion.

48 See *Santa Elena*, above n. 44 at paras 71–72.

49 *Metalclad Corporation v Mexico*, ICSID Case No. ARB (AF)/97/1, Award, 30 August 2000.

50 Metalclad claimed (a claim which Mexico denied) that it was assured by Mexico's National Ecological Institute (INE) that, while no municipal permit was required, it would facilitate amicable relations to secure such a permit, which could not be denied by the city. Both INE's president and the director-general of the Mexico Secretariat of Urban Development and Ecology (SEDUE) advised Metalclad that, except for a federal operating permit, all required permits for the facility had been secured by Coterin, the Mexican company from which it bought the site. In addition, early 1995 saw the University of San Luis Potosi issuing a study on the landfill's environmental impact, finding that proper engineering would make the landfill site suitable. A similar conclusion was reached by PROFEPA, the independent federal office for environmental protection.

51 See *Metalclad*, above n. 49 at para. 18.

52 *Ibid.* at para. 49.

However, the event that led to the arbitration was brought about by the state Governor who, nearing the end of his term of office, issued a decree establishing a protected natural area that included the landfill site, thereby effectively preventing its operation, without reference to the municipal permit. Metalclad consequently filed for arbitration under NAFTA, claiming a breach of Articles 1110 (expropriation) and 1105 (minimum standard of treatment) and requested a compensatory claim for such breaches.⁵³

The tribunal came to the conclusion that Metalclad had been denied FET because the municipal government had no authority to deny the construction permit on environmental grounds. Crucially, the tribunal went on to rule that the purpose of a government measure need not be considered in this regard and, as such, its test for expropriation was solely focused on the extent of the interference with property rights.⁵⁴

While the concept of legitimate expectations was elucidated throughout the *Metalclad* ruling in that Mexico did not set out lucid and clear procedures for a foreign investor, it is notable that the tribunal did not elaborate on the environmental aspects of the dispute. In particular, it is not clear how, and on what basis, the foreign investor might reasonably expect regulatory interference in an investment with such serious negative environmental impacts. Perhaps understandably, the convoluted history of the case appears, *prima facie*, to reflect the political dimensions of the dispute. However, it is noteworthy that, just as in *Santa Elena*, the tribunal decided not to examine the *purpose* of the government measure or its environmental connotations.

It may, therefore, be safe to conclude that, as in *Santa Elena*, the tribunal would have come to the same conclusion regardless of the evidence on environmental grounds leading to the government measure. Thus, both *Metalclad* and *Santa Elena* augur badly for the principle of environmental sustainability within the investment dispute resolution regime, creating concerns amongst environmentalists and government officials, not only in the NAFTA countries but other legal regimes based on the same rules of investment protection.

The 'regulatory chill' that could result from such decisions is exemplified in *Ethyl v Canada*,⁵⁵ which resulted from a ban by the Canadian government of a fuel additive (MMT)⁵⁶ used to provide octane enhancement for unleaded gasoline because of health concerns.⁵⁷ Ethyl, a manufacturer and distributor of MMT, was affected by this ban and consequently contested it under NAFTA. Ethyl argued that the ban constituted a breach of the expropriation, national treatment and performance requirement rights afforded by the NAFTA agreement. With the strong, although contested, arguments made by Canada

53 Ibid. at para. 1.

54 Ibid. at para. 111. The Tribunal determined that Metalclad's investment was completely lost as a result of Mexico's actions and proceeded to estimate the fair market value of the investment. On 30 August 2000, a special NAFTA tribunal awarded Metalclad US\$16,685,000. This did not include lost profits because the landfill was never in operation, but was based on the actual investment, including 6 per cent annual compounded interest made by Metalclad, as evidenced by tax filings and independent audit documents.

55 *Ethyl Corporation v Canada* (Jurisdiction Phase) 38 ILM 708 (1999) 876.

56 Methylcyclopentadienyl manganese tricarbonyl (MMT).

57 See *Ethyl Corporation v Canada*, above n. 55. Health concerns for its citizens were based on the presence of manganese in MMT. The dangers of inhaling manganese particles from motor vehicles burning fuel containing MMT have been known since the 1800s. Airborne manganese causes neurological impairments and symptoms similar to Parkinson's disease. Studies published in the 1990s in the *Public Health Journal* found 'compelling evidence of neurotoxicity associated with low-level occupational exposure' to manganese in the air. After finding that a gasoline additive was a health risk, Canada drafted a bill to ban the inter-provincial transportation of the chemical.

about the environmental and public health risks⁵⁸ posed by MMT, it is insightful that Canada agreed to rescind the MMT ban, paid Ethyl in excess of \$19million and took the unprecedented step of issuing a statement that MMT was neither an environmental nor a health risk.

Another recent dispute in which the tribunal recognised the essential nature of the environmental concerns, yet found that government measures in pursuance of them breached certain investment rights, is the *Marion Unglaube v Costa Rica* dispute under the International Centre for Settlement of Investment Disputes (ICSID) rules.⁵⁹ The claimants, Marion and Reinhard Unglaube, owned properties located in Playa Grande, an important site at which female leatherback turtles laid their eggs.⁶⁰ Given the endangered status of this species, and its well-known reputation as an ecotourism destination, Costa Rica announced its intention to create a national park in the area and pursued this objective through a succession of legal, administrative and court-ordered measures, the stated purpose of which was to bring the park into existence.⁶¹

The legitimacy of such environmental concerns was acknowledged by both parties. They disagreed on the scope of the rights of the Costa Rican Government either to take the property of private landowners or to regulate their use of particular properties.⁶² The claimants thus alleged, among other things, expropriation and a breach of FET.⁶³

In its ruling, the tribunal affirmed the strong, undisputed environmental considerations, recognising that the ‘... sharp decline in leatherback populations [is] reflected quite dramatically in the vastly reduced numbers of females nesting at Playa Grande in recent years ... [and that] the subject of the protection of endangered species is an important one ...’.⁶⁴ Nevertheless, it reduced the ‘crucial elements’ in the dispute to ‘mundane issues of fact and law as they relate to the legality of the actions in dispute between the Parties’. Consequently, the tribunal’s role was to ‘determine whether one or more violations of the Treaty have occurred, whether compensation is, therefore, due to the Claimants and, if so, in what amount?’⁶⁵

The implication of these cases is that the overpowering nature of investment protection rules – in this case the broad definition of the right of ‘expropriation’ in NAFTA – creates tensions between investment and environmental protection, especially as it has become one of the most cumbersome investment rights to define and predict. The fact that in *Ethyl*, Canada could not ban suspected chemical components outright in favour of proven, safer alternatives (which, under international environmental norms would be considered to be in line with the precautionary principle)⁶⁶ is testament to NAFTA’s effectiveness in constraining the regulatory power of states to act in the public good. This reflects an

58 However, there is not enough scientific evidence to support MMT’s negative health effects.

59 *Marion Unglaube v Republic of Costa Rica*, ICSID Case No. ARB/08/1.

60 Ibid. at para. 37.

61 Ibid.

62 Ibid. at para. 39.

63 Ibid. at para. 97.

64 Ibid. at paras 165, 167.

65 Ibid. at para. 167.

66 See Principle 15, Rio Declaration 1992, above n. 3. The precautionary principle or precautionary approach obliges states to take action on serious environmental risk even where there is lack of scientific consensus or certainty. See generally, J. Cameron and J. Abouchar, ‘Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment’ (1991) 14 *Boston College International & Comparative Law Review* 1.

economic-over-environment scenario, which is precisely the situation that environmentalists and regulators both fear: the ‘regulatory chill’ effect.⁶⁷

3.2 AFFIRMATION OF ENVIRONMENTAL PURPOSE UNDERLYING GOVERNMENT MEASURE

There have also been instances where tribunals have looked to the purpose of the measure in deciding whether or not investment protection rules have been breached. *Methanex v United States* serves as a prime example. The facts of the dispute were that California, through an executive order, had called for a phase-out of methyl tert-butyl ether (MTBE) in gasoline, in line with report on the ill-effects of MTBE by the University of California.⁶⁸ Interestingly, in addition to confirming the ill-effects of MTBE, the report recommended that California phase out MTBE over several years, rather than implement an immediate ban.⁶⁹ *Methanex*, in turn, filed an investor-state dispute challenging the Californian measure on the grounds that it was tantamount to expropriation as well as being discriminatory.⁷⁰

In rejecting the claim, the tribunal recognised that the environmental measure adopted by the host state did not amount to expropriation and found that the regulation was one of general application, in the public interest, scientifically justified, and accomplished with due process. As such, the tribunal concluded that ‘the California ban was a lawful regulation and not an expropriation’.⁷¹ Although it has been lauded by environmentalists, the judgment has been heavily criticised on the ground that the tribunal did not give clear guidelines as to the amount of discretion the host state had to decide on the significance of the environmental concerns.

A similar investment dispute, which upheld the environmental legislation, was the dispute in *Chemtura v Canada*.⁷² Here, voluntary measures were put in place, in collaboration with Canada’s Pest Management Regulatory Agency (PMRA),⁷³ to phase out the use of lindane pesticide for the treatment of canola seeds in Canada.⁷⁴ A review of lindane was completed and the PMRA decided that regulatory action banning its use on canola seeds was necessary. By the time Canada considered banning lindane, the United States had already prohibited its use.⁷⁵

67 J. Ferguson, ‘California’s MTBE Contaminated Water: An Illustration of the Need for an Environmental Interpretative Note on Article 1110 of NAFTA’ (2000) 11 *Colorado Journal of International Environmental Law and Policy* 16.

68 The report concluded that there are significant risks resulting from the MTBE contamination of surface water and groundwater. *Methanex v United States of America*, First Partial Award, (Methanex First Partial Award), 7 August 2002, para. 26. It was further argued to be a carcinogen to animals and possibly to humans. Finally there is found to be ‘no significant additional air quality benefit to the use of oxygenates such as MTBE in reformulated gasoline’ (at para. 12).

69 See *Methanex v United States of America*, *ibid*, at paras 13–14.

70 *Ibid*. at para. 83.

71 *Ibid*. at para. 7.

72 *Chemtura Corporation v Canada*, NAFTA/UNCITRAL, Award, 2 August 2010.

73 The federal regulator of pest control products in Canada.

74 See *Chemtura Corporation v Canada*, above n. 72, at paras 92–96.

75 *Ibid*. at para. 49. Since then, it has been designated as a possible carcinogen and environmental contaminant and identified as the cause of various additional negative health consequences in humans and animals, including death. The chemical has been banned or had its use restricted in numerous countries. However, Canada has merely restricted its use. Thus, while lindane was no longer permitted to be used in pesticides in Canada, it is still an active ingredient in shampoos used to treat head lice: above n. 72, para. 47. Japan, Germany, New Zealand, Austria, Brazil and Norway have all banned lindane.

Chemtura, a US-based investor, manufactured a lindane-based pesticide used to treat canola seeds and alleged that Canada had violated numerous NAFTA provisions when it banned the product for use as a pesticide. The investor argued that the ban, *inter alia*, breached the FET standard and was also an expropriation and claimed compensation for losses attributed to the ban.

On the grounds of expropriation,⁷⁶ the tribunal alluded to the assertion that the lengthy regulatory process and related decision were acceptable and, considering the worldwide treatment of lindane, Canada was well within its rights to ban its use as a pesticide.⁷⁷ It also stated 'the evidence shows that the measures did not amount to a substantial deprivation of the Claimant's investment'.⁷⁸ The arbitrators also took seriously Canada's claims that its actions were taken as a result of its obligations under international environmental law conventions. While the arbitrators did not view these considerations as shielding Canada's actions from review, they appeared to deem them as evidence of the government having acted in good faith with respect to Chemtura and its products.

This dispute and that of *Methanex* may appear to put to rest concerns that Chapter 11 of NAFTA impedes public health and environmental regulation. Yet the awards in both disputes are troubling. In *Chemtura*, the award is criticised for not delving into the intricacies of treaty interpretation and construction, and for not setting out any lengthy accounts of the tribunal's reading of the NAFTA protections.⁷⁹

The tribunal, like the earlier *Glamis Gold v United States* tribunal, rejected submissions by Canada that tribunals should defer to good-faith regulatory measures of governments but yet, still with scanty elaborations, declined to adopt the approach of the earlier *Glamis* tribunal.⁸⁰ Canada, Mexico and the United States have argued that claimants must satisfy the requirement that regulations have not been made in good faith and for a public purpose. However, arbitrators in numerous NAFTA cases have rejected this position, thus facilitating investor claims. The tribunal noted repeatedly that lindane was banned in many other countries, making it unclear whether the ban would have been upheld had Canada been a regulatory leader in limiting the pesticide on health or environmental grounds. A similar observation can also be made in respect of the *Methanex* decision.

The *Chemtura* tribunal did contemplate the idea that regulatory delays might give rise to some material economic impact on a foreign investor, but observed that the claimant had asserted no independent damages arising from long-running regulatory reviews. The

76 Above n. 26. Art. 1110(1) states that 'no party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law ...; and (d) on payment of compensation ...'

77 Above n. 72, at para. 266.

78 Ibid. at para. 265. The arbitrators took a dim view of Chemtura's claims, going so far as to remark upon the claimant's 'elusive' behaviour and its occasionally 'disingenuous' and 'inconsistent' arguments in the arbitration. Indeed, after dismissing all of Chemtura's claims, the arbitrators signalled that it would be 'fair' for the claimant to bear the costs of the arbitration and that it would be 'just' and 'appropriate' for the firm to reimburse Canada for half of its legal costs (US\$688,219). Chemtura paid half of Canada's legal costs at C\$5.778 million.

79 L.E. Peterson, 'Arbitrators in *Chemtura v Canada* NAFTA Arbitration take Economical Route in Finding no Treaty Breaches', *Investment Arbitration Reporter*. Available at: www.iareporter.com/articles/20100916_11 (last accessed 10 September 2012).

80 See *Glamis v United States*, above n. 40. This approach requires that the claimant provides affirmative evidence of any alleged expansion of the NAFTA minimum standard of treatment beyond its established content in international customary law.

tribunal's brief discussion of this issue was redolent of a few other investment treaty arbitrations where tribunals appeared to entertain the notion that treaty breaches may or may not have occurred, depending upon whether there was some measurable economic loss.

The tribunal further stated that the measures in question constitute 'a valid exercise of Canada's police powers'.⁸¹ On the facts of the case, the arbitrators saw no 'substantial deprivation' of Chemtura's investments, such that there might be an expropriation as per Article 1110 of NAFTA by Canada. Moreover, in a development that might have been more widely heralded a decade before, arbitrators also signalled their view that Canada's actions fell within that country's police powers under international law. Why this particular dispute passed this unique 'police powers' test is unclear.

The positive outcomes of these two cases demonstrate the potential and promise of integrating environmental concerns into the investment regime through arbitral decisions. The downside, however, is that they do not set out clear guidelines to inform other arbitral panels, treaty makers, home and host states and foreign investors as to why a particular tribunal may or may not acknowledge environmental concerns – a situation which could also affect developing countries in further establishing their nascent environmental legislative jurisdictions.⁸²

Another significance of the *Chemtura* dispute lies in the fact that, although Canada was successful, defending the claim was expensive.⁸³ Ultimately, the Canadian taxpayer spent \$3 million in defending a challenge to a policy with a significant public purpose, taken by a democratically elected government.

3.3 CONSIDERATION (BUT NO AFFIRMATION) OF THE ENVIRONMENTAL PURPOSE UNDERLYING GOVERNMENT MEASURES

Apart from those cases where there was neglect of the environmental concerns and others where such concerns were affirmed as the legitimate exercise of the regulatory power of the state for public purposes, there is a third category of cases where the tribunal accepted the significance of the environmental concerns but still decided that there was a violation of the investment agreement rights. One such example is *S.D. Myers Inc. v Canada*.⁸⁴

This dispute⁸⁵ concerns a claim for breach of investment rules as a result of the restriction of movement of certain hazardous waste across the Canada–US border in line with

81 Above n. 72 at para. 266. The tribunal explained that the measures challenged by the claimant constituted a valid exercise of the respondent's police powers. 'Under Art. 1105 of NAFTA, the [Pest Management Regulatory Agency of Canada] took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is held to be a valid exercise of the State's police powers and, as a result, does not constitute an expropriation.'

82 M. Sornarajah, 'A Law for Need or A Law for Greed? Restoring the Lost Law in the International Law of Foreign Investment' (2006) 6 *International Environmental Agreements: Politics, Law and Economics* 329.

83 Above n. 72. In the end, the total costs associated with the arbitration (including a C\$4000 per day fee for each tribunal member) amounted to almost C\$9 million, with Canada's outlay at just under C\$6 million.

84 *S.D. Myers Inc. v Canada*, 40 ILM 1408 (2001).

85 Ibid. at para. 84.

international environmental commitments and public health purposes.⁸⁶ Export into the United States would only be permitted where the prior approval of the Environmental Protection Agency (EPA) had been obtained. In 1980, the United States closed its borders to the import and export of PCB waste and signed an agreement with Canada to reduce the transboundary movement of hazardous waste.⁸⁷ In 1989, Canada signed the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the Basel Convention).⁸⁸ In 1995, to further the removal of PCB waste in an environmentally sound manner in Canada and to prevent any possible significant danger to the environment or to human life or health, the Canadian Environment Minister signed an interim order banning the export of PCB waste from Canada.⁸⁹

S.D. Myers Inc. then brought a claim against Canada under Chapter 11 of NAFTA⁹⁰ stating that Canada had, among other things, breached the minimum standard of treatment and expropriated their business. The tribunal, in determining the applicable law according to Article 1131 of NAFTA, the Transboundary Agreement, the Basel Convention and the North American Agreement on Environmental Cooperation (NAEEC), concluded that the Transboundary Agreement between Canada and the United States governed the movement of waste between the two countries, not the Basel Convention.⁹¹ This was a significant snub of an international environmental law instrument. The panel rejected Canada's defence that the enforcement discretion was an unlawful action by the EPA, stating that its determination would be based on the actions of the disputing parties on the basis of the law as it appeared to exist. Canada passed the interim and final orders and did not challenge the legality of the enforcement discretion.⁹²

To determine whether the interim order was a legitimate environmental measure, the panel referred to the World Trade Organization/General Agreement on Tariffs and Trade (WTO/GATT) precedent and held that 'where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade'⁹³ and that the environmental objectives of the Canadian Government could have been achieved through other means.⁹⁴

This outcome is quite consistent with the language and the case law arising out of the WTO family of agreements. The tribunal based its decision on the factual finding that a large part of the PCB waste would be transported from Ontario and Quebec to a treatment facility in Alberta, which is much farther than to the S.D. Myers facility in Ohio.⁹⁵ None-

86 Ibid. Both the US and Canada banned the future production of PCB following the Council Decision by the OECD in 1973 to control and limit the use of PCBs to reduce the risk to human health and the environment. In 1977, Canada added PCBs to the toxic substances list under the Environmental Contaminants Act replaced by the Canadian Environmental Protection Act (CEPA) in 1988. The Act was supplemented by the PCB waste export regulations of 1990 (PCB Waste Export Regulations, SOR/90-453 (1990) (Can.)). See OECD, Protection of the Environment by Control of Polychlorinated Biphenyls C (73) I (Final) (1973).

87 See *Myers v Canada*, above n. 84. 'The Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste', 28 October 1986, CTS. 1986 No. 39 (entry into force 11 August 1986) (hereinafter 'Transboundary Agreement').

88 Above n. 84. 'The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal', 22 March 1989, 1673 UNTS 57 (entry into force 5 May 1992) (hereinafter 'Basel Convention').

89 Explanatory note attached to the interim order. Above n. 84 at para. 123.

90 Ibid. at paras 66–76.

91 Ibid. at para. 213.

92 Ibid. at para. 191.

93 Ibid. at para. 231.

94 Ibid. at para. 144.

95 Ibid. at para. 56.

theless, the panel did not address the fact that the shipment of the waste to Ohio was only for recycling, after which it would be transferred to Texas for incineration.⁹⁶ It also declared that the ban was not justified by *bona fide* environmental concerns, therefore there was no legitimate environmental reason for the ban.⁹⁷

Clearly the tribunal accepted that ‘international law makes it appropriate for tribunals to examine the purpose and effect of governmental measures’.⁹⁸ Nevertheless, in meeting its international environmental commitments, the tribunal obliges host states to adopt measures that are least inconsistent with investment protection.⁹⁹ Although, on the face of it, this may appear innocuous, it is a significant restriction of a sovereign government’s margin of discretion in the discharge of its regulatory function for legitimate public policy concerns, and results in the ‘regulatory chill’.¹⁰⁰ It is debatable whether the tribunal is more qualified than the state to determine the most effective means and measures.¹⁰¹

4 INVESTMENT CASE ANALYSIS

The above cases demonstrate a number of key concerns regarding environmental considerations within the international investment regime. The first is the lack of certainty on the part of both foreign investors and host state governments regarding how a tribunal will view regulatory measures by governments for legitimate environmental purposes relative to investment protection rights. Tribunals may totally disregard the purpose, however legitimate, of such a measure. Alternatively, they may affirm that the purpose is relevant and might be a legitimate defence to a claim of breach of investment protection rules but without any clear criteria or guidelines as to how such a conclusion is reached. This leaves both parties unable to effectively assess the ‘risk’ of either their investment or regulatory decisions.

A second concern, which is related but fundamentally different from the above, is that this opacity demonstrates a lack of, or very slow progress, in integrating environmental considerations as an essential part of the sustainable development principle in the investment law regime. It is questionable how big an impact arbitral decisions can have in raising the standard of sustainability, considering that they are case-specific and non-precedential. This gap is crucial because, as noted earlier, investment drives the global economy and many of the serious environmental challenges facing the global community are rooted in industries or projects financed by foreign investment. If environmental concerns are not integral to the investment law regime, or if there is significant uncertainty about investment rights *vis-à-vis* legitimate environmental concerns, the outcome constrains or restricts both policy and decision making, thereby representing a serious blow to actualising the more holistic approach to growth and development envisaged under the principle of sustainable development.

96 Ibid. See also T. Weiler, ‘A First Look at the Interim Merits Awards in S.D. Myers Inc and Canada: It is possible to balance Legitimate Environmental Concern with Investment Protection’ (2001) 24 *Hastings International and Comparative Law Review* 177.

97 Above n. 84 at para. 43, 60.

98 Ibid. at para. 281.

99 Ibid. at para. 221.

100 M. Hirsch, ‘Interactions Between Investment and Non-Investment Obligations in International Investment Law’ in P. Muchlinski, F. Ortino and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press: Oxford, 2008) 16.

101 K. Tienhaara, ‘The Expropriation Governance: Protecting Foreign Investors at the Expense of Public Policy’ (2011) 2 *Journal of World Energy Law & Business* 201.

A third concern is that there is a wealth of evidence that several countries, especially in the developing world, have weak regulations and poor enforcement of regulations designed to reduce the environmental impact of the operations of multinational companies. Several factors, including capacity deficits and governance challenges, as well as economic factors, account for this. The ‘regulatory chill’ from the decisions, as noted above, can only further weaken the resolve of such countries to regulate effectively to address legitimate environmental concerns. Countries can, therefore, find themselves locked into maintaining the status quo of poor environmental standards.

Furthermore, the rigid way in which investment protection rights are applied fails to recognise one of the fundamental realities of environmental regulation – they are very much science driven. This not only means that regulation has to evolve in line with the science (thus resulting in changes in the status quo that may be considered expropriation), but also that there is often a lack of consensus about the risks, causes and effects. Consequently, it is often a matter of judgment on the part of policy and lawmakers whether or not to adopt a particular position in the light of available evidence. This underlies the precautionary principle in environmental law. As such, even a dispute with ‘positive’ outcomes for the environment, such as *Methanex*, is not particularly helpful as it relies so heavily on the scientific evidence.

In light of the above, there is clearly a need for a predictable framework or set of mechanisms by which tribunals can adjudicate on investment disputes in a manner that effectively integrates environmental concerns into the process. While the instinct is to look towards an international investment treaty to address these concerns, it is unlikely that such a treaty will be forthcoming in the near future, if at all. In light of the short history of environmentalism, authoritative soft law instruments have often filled the spaces created by the absence of binding instruments, becoming launch pads for practical frameworks for responding to sustainability challenges. It is within this context that the outcome from Rio+20, coming 20 years after the Rio Declaration, had the potential to serve as a catalyst on a practical level for advancing sustainability integration within economic regimes, including mechanisms to ensure coherent and consistent jurisprudence from arbitral tribunals on sustainability integration in a manner that promotes all three pillars of the principle. In the next section, we explore the extent to which this was achieved at the Rio+20 conference.

5 RIO+20 AND MECHANISMS FOR INTEGRATING SUSTAINABILITY IN INVESTMENT ARBITRATIONS

This section considers two documents emanating from Rio+20. The aim is to determine whether it sets out principles or mechanisms that could help to facilitate the integration of sustainability within the investment regime, particularly within the context of investment arbitrations. The first is the document from the main conference, while the second is from a parallel conference for judges sponsored by the United Nations Environment Programme (UNEP), the UN organ charged with responsibility for the environment.

5.1 THE RIO+20 OUTCOME DOCUMENT – THE FUTURE WE WANT

The main Rio+20 Conference produced an outcome document entitled *The Future We*

Want (FWW).¹⁰² Although there is some positive analysis of the outcome document,¹⁰³ on the whole the FWW was heavily criticised by the majority of civil society groups, environmental non-governmental organisations (NGOs) and the media.¹⁰⁴ One of the main thrusts of this critique was that rather than develop robust policies and implementation mechanisms for the integration of environmental and social concerns into the international economic system, the provisions of the FWW appeared to empower corporate actors whose prioritisation of economic goals within the sustainable development paradigm has long hindered the mainstreaming of environmental and social concerns within international economic law systems.

The FWW pays scant attention to the current subordination of environmental and social concerns within the international investment regime, nor does it acknowledge the absence of clear and consistent mechanisms for determining the right balance between economic and environmental objectives. Rather, the focus is on the positive aspects of investment as a means of ensuring social goals such as education, poverty eradication, infrastructure development, and the promotion of 'green' products and processes. Indeed, foreign direct investment is specifically mentioned only once, in paragraph 271, within the context of its role in 'achieving enabling environments for the development, adaptation, dissemination, and transfer of environmentally sound technologies'.¹⁰⁵

More troubling is the fact that paragraph 58(a) of the FWW appears to affirm unreservedly current international economic law, and subjugates sustainability principles to it when it 'affirm[s] that green economy policies in the context of sustainable development ... should be consistent with international law'. This is a roll-back on the position set out in Agenda 21, where it is international law that is required to be made consistent with sustainable development when it provides that states should 'strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements or instruments'.¹⁰⁶ Since the status of sustainable development as a principle of international law is still contested, the implication of the FWW provision is that policies integrating 'green' concerns into the international investment regime should be consistent with the established international law protections on investments outlined earlier in this article. What paragraph 58(a) appears to do, therefore, is affirm the position of investment tribunals in cases such as *Marion Unglaube v Costa Rica*, where arbitrators saw their duty as being to determine 'mundane issues of fact and law as they relate to the legality of the actions in dispute between the parties' rather than look to the purpose of the regulatory measure within the wider framework

102 This has now been adopted by the UN General Assembly. See *The Future We Want*, above n. 6. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/288&Lang=E (last updated 20 September 2012).

103 A. Powers, 'The Rio+20 Process: Forward Movement for the Environment?' (2012) 1 *Transnational Environmental Law* 403.

104 G. Monbiot, 'After Rio, We Know Governments have Given Up on the Planet', *The Guardian*, 25 June 2012. Available at: www.guardian.co.uk/commentisfree/2012/jun/25/rio-governments-will-not-save-planet (last accessed 22 September 2012); F. Harvey, 'Global Fight for Natural Resources has Only Just Begun', *The Guardian*, 12 July 2012. Available at: www.guardian.co.uk/environment/2012/jul/12/global-natural-resources-food-water?INTCMP=SRCH (last accessed 22 September 2012). Friends of the Earth International, 'A Gift to Corporate Polluters'. Available at: www.foei.org/en/media/archive/2012/rio-20-declaration-a-gift-to-corporate-polluters (last updated 20 September 2012).

105 Above n. 3, Principle 271, which provides that: 'We underline the need for enabling environments for the development, adaptation, dissemination, and transfer of environmentally sound technologies. In this context, we note the role of foreign direct investment, international trade and international cooperation in the transfer of environmentally sound technologies. We engage in our countries as well as through international cooperation to promote investment in science, innovation, and technology for sustainable development.'

106 Above n. 3, Principle 27.

of sustainable development. Environmental policies could therefore be either stymied or never come into being as a result of the 'regulatory chill'.

A further concern in the FWW document as it relates to investment disputes is its apparent watering down of the language of sustainable development by using it interchangeably with 'sustained economic growth' in various parts of the document.¹⁰⁷ In doing so, it arguably stands the principle on its head, since the very rationale for the principle of sustainable development is to serve as a check on untrammelled economic growth. Growth can be sustained without necessarily being truly sustainable, in the sense of addressing all three pillars of the sustainable development principle.

The failings of Rio+20, with its undue emphasis on the international economic system, can perhaps be explained by the fact that it took place against the backdrop of the prevailing weak global economy, brought on by the worldwide financial crisis. State parties, particularly capital exporting states, may have felt compelled to prioritise economic growth. If that was the case, it is an inherently paradoxical outcome, since the financial crisis is perhaps some of the best evidence of the dire consequences of unbridled economic growth driven by poorly regulated corporate actors.¹⁰⁸

In light of the failings of Rio+20, we look, in the next section, to the outcome from a sister conference at Rio+20: The World Congress on Justice, Governance and Law for Environmental Sustainability (The Judges' Conference), for guidance on appropriate mechanisms for integrating environmental issues into the adjudicatory process.¹⁰⁹

5.2 THE DECLARATION OF THE RIO+20 JUDGES' CONFERENCE

The Judges' Conference, which was attended by over 150 judges and other judicial personnel, produced a separate document – the *Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability*.¹¹⁰ This was much more concise and focused on achieving the integration of environmental concerns through judicial and governance systems. The focus on the environment component of sustainable development is perhaps not surprising, considering that it was sponsored by UNEP.

The preamble and text of the Declaration recognises the pivotal role of adjudicators in developing and promoting environmental sustainability. It provides, *inter alia*, that the 'Judiciary ... has been the guarantor of the rule of law in the field of the environment worldwide and that judicial independence is indispensable for the dispensation of environmental justice' ... and furthermore that '... a rich corpus of [judicial] decisions ... [has had] a lasting effect on improving social justice, environmental governance and the further development of environmental law'. Although this text refers to the formal judicial sector, there is nothing stopping arbitrators who perform similar functions from engaging in such activism to better integrate environmental and social concerns within the system. The question though is why this has not happened so far, and what needs to be done to encourage such developments. Perhaps the answer lies partly in the fact that arbitrators are mainly commercial lawyers whose understanding of sustainable develop-

107 See Rio outcome document (FWW), paras 11, 52, 56, 58e, 94, 158, 281, above n. 102.

108 See Emeseh, above n. 21 for further discussion of the causes of the financial crisis.

109 This sister conference held under the auspices of the UNEP, during the same week as the Rio+20, involved over 150 judges, lawyers, and other judicial personnel from across the globe, including chief justices, heads of jurisdiction, attorney and auditor generals, chief prosecutors.

110 Available at: www.unep.org/rio20/Portals/24180/Rio20_Declaration_on_Justice_Gov_n_Law_4_Env_Sustainability.pdf (last accessed 20 September 2012).

ment would be via the lens of international economic law norms rather than international environmental law norms.

This leads on to another key aspect of the Declaration which is its recognition of the need for 'effective dispute settlement systems' not only at the national level, but also internationally as '[e]nvironmental litigation often transcends national jurisdictions'. This view has resonance for the international investment dispute settlement regime. In its current form, the system is populated by investment arbitrators who are commercial lawyers, with understandably limited awareness of the broader implications of environmental issues or, indeed, environmental norms. For such an adjudicator, the impact of investment on endangered species with no apparent immediate implications would have a very different meaning than for a judge in a national environmental tribunal. There is a strong case, therefore, for the 'greening' of a tribunal faced with a dispute involving environmental concerns, perhaps by requiring that an environmental lawyer sits as one of the panel members, or that sustainability training be a requirement for registration as an arbitrator.

On a wider level, it raises the question of whether there ought to be an international environmental dispute settlement body, where environmental jurisprudence can be developed in a manner similar to the international human rights system. Principles and clearly developed criteria in such a forum will assist in promoting effective integration of environmental concerns in investment arbitral decisions. Such an arrangement is not too far-fetched and can be envisaged within the context of the judges' call for a strengthened role for UNEP (as part of strengthening the international governance institutions on the global environment) 'to effectively lead and advance the global policy and law-making agenda for the environment within the framework of sustainable development'.

The Declaration also comes up with a number of principles for advancing environmental sustainability which appear to be focused on national regimes rather than at international level or non-state mechanisms such as investment tribunals. Considering the importance of these tribunals in the development of sustainable development, adopting much broader principles which could be applied within these contexts would have been valuable. This is particularly important in light of the judiciary in some national regimes proactively promoting environmental sustainability even without binding laws.¹¹¹ A clear set of principles could sow the seeds for activism to take root even within investment tribunals.

Considering the issue holistically, strengthening national institutions can benefit more effective integration of environmental sustainability in the investment regime. Thus the judges' call for the 'integrity of institutions and decision-makers' has relevance for the environment-investment disputes. A legal system where environmental laws and regulatory and administrative procedures are not transparent provides more opportunities for foreign investors, and indeed tribunals to question the purpose of environmental regulations; or claim that the introduction of such regulation was against their legitimate expectation (FET). A consistent and transparent environmental regulatory system would provide fewer bases for such claims. Moreover, establishing 'specific criteria for the inter-

111 Examples of this activism can be found in the recognition of environmental rights without express constitutional provisions in a number of countries. For an overview, see Z.M. Nomani, 'The Human Right to Environment in India: Legal Precepts and Judicial Doctrines in Critical Perspective' (2000) 5 *Asia Pacific Journal of Environmental Law* 113; and N.A. Robinson, 'A Common Responsibility: Sustainable Development and Economic, Social and Environmental Norms' (2000) 4 *Asia Pacific Journal of Environmental Law* 195.

pretation' within environmental laws themselves may influence the thinking of investment tribunals towards interpretations more favourable to the achievement of environmental sustainability.

6 CONCLUSION

Over 20 years after the popularisation of the principle of sustainable development by the Rio Declaration, its integration into the international economic law systems still remains a challenge. Within the investment regime, there are still no binding frameworks for the integration of sustainability. Although international investment law instruments now contain some provisions on environmental and social concerns, they still remain largely ancillary to the binding protections available for the economic interests of investors. Specifically, the lack of appropriate integrations has implications for states' exercise of their regulatory powers in the public interest.

The analysis of arbitral tribunal decisions in this article on disputes relating to the legitimacy of government measures made on environmental grounds overwhelmingly demonstrates a disregard for the public purpose underlying government measures as this was considered irrelevant to the 'legal' question of the breach of investor protection rules. This is at odds with the goal of the principle of sustainable development, which is to ensure a holistic approach to development that considered equally environmental, social and economic concerns. Even in the few instances where the environmental measure was upheld, the tribunal did not set out a clear rationale or criteria for the decision. This creates uncertainty for all parties and to what is known as 'regulatory chill effect' where states fail to enact or implement environmental measures because of the possible consequences.

Part of the problem is that in the absence of binding legal instruments, the place of environmental norms within the investment regime is largely a matter of interpretation by arbitrators whose backgrounds and outlook favour the prioritisation of investment law norms. They are not helped by a lack of clear principles or mechanisms for integrating environmental and social concerns into the investment regime. Unfortunately, despite expectations, the FWW – the outcome document of the main Rio+20 Conference – delivered little in the way of principles or mechanisms to address this gap. However, the declaration from the Judges' Conference, which was organised by UNEP and held simultaneously with the main Rio Conference, provides some broad principles and implementation mechanisms which, if built upon, can help to facilitate a coherent and consistent approach for tribunals in determining whether or not a governmental measure is legitimately made such that it would not be considered a breach of investment protection rules at international law.

However, there needs to be a much more focused fleshing out of the principles and mechanisms contained in the Judges' Declaration if there is to be any real optimism for better integration of environmental sustainability within investment law through the rulings of tribunals. These include a requirement for 'greening' of arbitral tribunals in matters related to environmental or social concerns to ensure expert analysis of the sustainability issues before the tribunal; establishing a clear set of criteria for determining when a government measure would be deemed to have been validly made and therefore not in breach of international investment protection; and the adoption of a purposive approach to the interpretation of investment protection rules in a manner that achieves the goal of sustainable development most investment law instruments now aspire to,

including in relation to states' obligations under international environmental law.¹¹² Such measures will go a long way towards achieving integration until such a time, if ever, when a binding legal regime is established to ensure that all three pillars of sustainable development are given due consideration within the investment regime.

112 This will be in accordance with international law on the interpretation of treaties. See Art. 31 of the Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. It provides, *inter alia*, that: '(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'